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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 346

VULCAN FURNITURE MANUFACTURING CORPORATION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. 17–22) is reported at 214 F. 2d 369. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 81–84)[1] are reported at 103 N. L. R. B. 870.

[1] The reference "R" designates the Transcript of Record in the court of appeals; "B. A." the Appendix to the brief of the Board filed in the court below; and "Pet." the Petition herein.

JURISDICTION

The judgment of the court below was entered on July 7, 1954 (Pet. 23). The petition for a writ of certiorari was filed on September 16, 1954. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1) and Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

Whether an employer charged with a refusal to bargain with a union has the right in proceedings before the National Labor Relations Board to adduce evidence to show that the non-Communist affidavits filed by the union with the Board to establish compliance with Section 9 (h) of the National Labor Relations Act are in fact false or otherwise inadequate to establish such compliance.[2]

STATUTES INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29

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[2] Since petitioner does not set forth any reasons which would warrant consideration of its second question, we note only that the Board's uniform practice of disregarding blank ballots cast in a representation election was expressly approved by the court below in the instant case and is comparable to the practice approved by the courts in analogous situations. See *Virginian Railway Co.* v. *System Federation*, 300 U. S. 515, 560–561; *Association of Clerical Employees* v. *Brotherhood, etc.*, 85 F. 2d 152, 157 (C. A. 7); *Semi-Steel Casting Co.* v. *National Labor Relations Board*, 160 F. 2d 388, 392 (C. A. 8), certiorari denied, 332 U. S. 758.

U. S. C. 151, *et seq.*), and the Communist Control Act of 1954 (Public Law 637, 83rd Cong., 2d Sess.), are set forth in the Petition, pp. 13–16.

STATEMENT

On May 7, 1951, United Furniture Workers of America, CIO, herein called the Union, initiated a representation proceeding before the Board to obtain certification as bargaining representative of petitioner's employees (R. 4–10). Petitioner, alleging that Max Perlow, a past president of the Union, had admitted his Communist affiliation, moved to dismiss the proceeding or hold it in abeyance pending an investigation to determine whether the Union was still "Communist inclined or aligned" (B. A. 40). In its Decision and Direction of Election, issued August 29, 1951, the Board denied this motion on the ground that "the fact of compliance by a labor organization which is required to comply, is a matter for administrative determination and is not litigable by the parties. Moreover, the Board is administratively satisfied that the [Union] is in compliance". (R. 29, n. 1.)[3]

In due course the Union was certified (R. 50–53). However, petitioner refused to honor the

[3] In this connection the Board cited its own decision in *Sunbeam Corp.*, 94 N. L. R. B. 844, where the Board stated that as part of its administrative investigation of compliance, it considers any relevant information brought to its attention.

certification and a complaint issued on the Union's charge that petitioner was unlawfully refusing to bargain (R. 63–66). During the unfair labor practice hearing held pursuant to this complaint, petitioner again urged, *inter alia,* that the Union was not in compliance with Section 9 (h) of the Act and attempted to adduce evidence in support of this claim (B. A. 16–17, 24–25). The Board affirmed the Trial Examiner's rejection of the proffered evidence (R. 82, n. 2).[4] The Board reiterated its ruling that the fact of compliance by a labor organization is a matter for administrative determination and is not litigable by the parties. It also made an express administrative finding, as it had in the prior representation proceeding, that the Union was in compliance with Section 9 (h), its officers having filed the required non-Communist affidavits. (R. 82, n. 2.)

On the Board's petition for enforcement, the court below affirmed the Board's findings of an unlawful refusal to bargain and entered a decree enforcing the Board's order (Pet. 17–23). Addressing itself to the propriety of the Board's administrative determination that the Union was in compliance with Section 9 (h) of the Act and

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[4] The Trial Examiner, while rejecting testimony and exhibits proffered by petitioner, accepted an offer of proof and placed the exhibits in a "rejected exhibits" file (B. A. 16–17, 24). This material was available to the Board and is now before this Court as part of the certified record (R. 99, par. 14).

the propriety of its refusal to receive evidence in support of petitioner's contention to the contrary, the court below agreed that, whatever the scope of the Board's power with respect to initiating an administrative inquiry into the truth or falsity of non-Communist affidavits filed pursuant to Section 9 (h), neither the Act nor the intent of Congress warranted the view that once the requisite affidavits had been filed, a party to a proceeding before the Board "may question the truthfulness of the affidavits or whether the ostensible officers filing them are the true directors of the Union involved" (Pet. 20).

ARGUMENT

1. The question presented is whether the Board properly denied petitioner the right to adduce evidence in proceedings before the Board to establish that the Union's non-Communist affidavits, formally sufficient on their face, were in fact inadequate to establish compliance with Section 9 (h) of the Act. Petitioner, dissatisfied with the Board's express administrative determination that the requisite non-Communist affidavits had been filed and that the Union was in fact in compliance, sought to litigate that issue in the course of proceedings before the Board.

The ruling of the court below that this question is not litigable by private parties in proceedings before the Board—a conclusion concurred in by the two other courts of appeals which have speci-

fically considered the question—is clearly correct.[5] *National Labor Relations Board* v. *Sharples Chemicals, Inc.*, 209 F. 2d 645, 649–651 (C. A. 6); *American Rubber Products Corp.* v. *National Labor Relations Board*, 214 F. 2d 47, 55 (C. A. 7); cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968; *National Labor Relations Board* v. *Greensboro Coca Cola Bottling Co.*, 180 F. 2d 840, 845 (C. A. 4); *National Labor Relations Board* v. *Red Rock Co.*, 187 F. 2d 76, 78 (C. A. 5), certiorari denied, 341 U. S. 950; *Law* v. *National Labor Relations Board*, 192 F. 2d 236, 239 (C. A. 10). As the court below stated (Pet. 20):

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[5] Petitioner ostensibly challenges the decision below only insofar as "it may be construed to have denied a party's right to give (as opposed to litigate) and the Board's duty to receive, evidence of non-compliance with Section 9 (h)" (Pet. 8). It also disclaims any purpose to litigate the fact of compliance by the Union, asserting that all it sought to do was "to furnish the Board with information which would tend to show the falsity of the affidavit filed by the Union (B. A. 21–25)" (Pet. 9). It is clear, however, that petitioner's disclaimer is insubstantial and that its disagreement with the decision below turns upon the denial of petitioner's asserted right to "litigate" the issue of compliance. For, in petitioner's words, it is insisting upon a right to show "through cross examination of the Union's representatives, * * * who were all of the officers of the Union (B. A. 16–17)"; "to introduce evidence which would tend to show that there were officers of the Union who were Communists (B. A. 16–25)"; and "to subpoena and question witnesses and examine documents from which evidence relevant to compliance can be obtained and submitted to the Board" Pet. 8, 10–11).

> * * * Congress did not intend that each of the numerous proceedings instituted by the Board upon complaints of violation of the statute against parties throughout the nation should be delayed and determined on a case-to-case basis with all the attendant opportunities for delay in the functioning of the processes of the Act.

The legislative history of the Act discloses that Congress considered and rejected a provision which forbade certification of any union as a collective bargaining representative if its officers were members of the Communist Party—a provision which would have rendered that issue litigable in every case before the Board.[6] It was to avoid this result and to prevent Board proceedings from being delayed and encumbered with such issues that Congress adopted Section 9 (h) in its present form requiring the filing with the Board of non-Communist affidavits. 93 Cong. Rec. 6444, 6447, 6860. See also cases *supra*.[7]

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[6] H. R. 3020, 80th Cong., 1st Sess. See Sec. 9 (f), (g) (April 18, 1947), (h) (May 13, 1947) in 1 Legislative History of the Labor-Management Relations Act, 1947 (Govt. Print. Off., 1948).

[7] The Joint Committee on Labor-Management Relations Act, established by Congress to study and report on the operation of the amended Act, has noted with approval the Board's practice of refusing to permit private parties to litigate compliance issues in Board proceedings. S. Rept. No. 986, Part 3, 80th Cong., 2d Sess., p. 45, quoted in *National Labor Relations Board* v. *Wiltse*, 188 F. 2d 917, 922 (C. A. 6), certiorari denied, 342 U. S. 859.

As the court below indicated (Pet. 20), the question of the power of the Board to initiate and conduct an administrative inquiry into the question of the truthfulness of the affidavits or whether the ostensible officers filing them are the true directors of the union involved (which this Court declined to review last term) is not presented by this case. *Farmer* v. *United Electrical Workers*, 211 F. 2d 36 (C. A. D. C.), certiorari denied, 347 U. S. 943; cf. *Aerovox Corp.* v. *National Labor Relations Board*, 211 F. 2d 640 (C. A. D. C.), certiorari denied, 347 U. S. 968. It is thus beside the point to say, as petitioner urges (Pet. 10), that the effect of the decision below "is to shut off [the Board's] most likely and practical course for getting any information on which to base an investigation" as to the compliance status of a union. The difficulties which the statutory scheme may entail are matters which appropriately should be addressed to Congress rather than the courts. In this connection attention is invited to the Communist Control Act of 1954[8] (Pet. 15–16), which, *inter alia*, requires the Subversive Activities Control Board to serve a copy of any order with respect to Communist-infiltrated labor organizations on the National Labor Relations

[8] Public Law 637, 83d Cong., 2d Sess., Sec. 10 adding 13A (g), (h), (i) to the Subversive Activities Control Act of 1950 (64 Stat. 987, 50 U. S. C. 781 *et seq.*).

Board, and provides that when there is in effect a final order of the Subversive Activities Control Board determining that any such labor organization is Communist infiltrated, such organization shall be ineligible to serve as an exclusive representative of employees of any bargaining unit under Section 9 of the National Labor Relations Act, as amended (29 U. S. C. 159), or to make any charge under Section 10 of the Act (29 U. S. C. 160).

CONCLUSION

The decision below is correct and presents no conflict of decisions. The petition for a writ of certiorari should therefore be denied.

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